UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: September 20, 1991

BEFORE: Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 90-2275

CHI FENG SU,

Petitioner-Appellee

v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 C 4516, Judge James H. Alesia

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this appeal is hereby, DISMISSED for lack of jurisdiction, in accordance with the order of this Court entered this date.

[UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 53]

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 4, 1991

September 20, 1991

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 *v.*

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 89 C 4516—**James H. Alesia,** *Judge.*

ORDER

Petitioner Chi Feng Su ("Su") successfully sought a writ of habeas corpus from the district court. Su had been indicted in the Circuit Court of Kane County, Illinois. The

55 counts of the indictment charged delivery of a controlled substance to one of four undercover police officers. The State elected to prosecute Su on Counts 41 through 55 of the indictment but introduced evidence as to all counts to establish Su's "motive, intent, method of operation and common scheme." He was acquitted on all fifteen counts in a bench trial. Thereafter the State decided to prosecute him on Counts 1 through 40. He unsuccessfully moved to dismiss those counts on various grounds, including collateral estoppel and the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment. The Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied his petition for leave to appeal.

Judge Alesia granted Su's subsequent petition for a writ of habeas corpus on the basis of the double jeopardy clause because the State was planning to present the same evidence at the second trial as in the first trial to show Su's intent. See *Ashe v. Swenson*, 397 U.S. 436.

In the district court, the defendants were Robert F. Casey, who is the State's Attorney of Kane County, John Randall, its Sheriff, and then-Illinois Attorney General Hartigan. However, none of the respondents was named in the notice of appeal filed by an Assistant Attorney General of Illinois. Instead, the notice of appeal provided:

> Notice is hereby given that respondents, by their attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, hereby appeals [sic] to the United States Court of Appeals for the Seventh Circuit, from an order granting the petitioner's petition for a writ of habeas corpus entered in this action on the 11th day of May, 1990.

It should be noted that the only person named in the body of the notice of appeal was the attorney for the respondents.

Federal Rule of Appellate Procedure 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal." The Supreme Court has recognized the jurisdictional import of this rule, holding that "[t]he failure to name a party in a notice of appeal * * * constitutes a failure of that party to appeal." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314. This Court has consistently followed *Torres* in similar circumstances.* Accordingly, the notice of appeal was defective and the appeal is dismissed for lack of jurisdiction.

* *Pride v. Venango River Corporation*, 916 F.2d 1215 (1990); *Hartford Casualty Ins. Co. v. Borg Warner Corporation*, 913 F.2d 419 (1990); *Bigby v. City of Chicago*, 871 F.2d 54 (1989); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (1988).

[DATED MAY 10, 1990]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
CHI FENG SU,

Petitioner,

v.

ROBERT F. CASEY, et al.,

Respondents.

No. 89 C 4516—Judge James H. Alesia

ORDER

This matter coming on the Petition for a Writ of Habeas Corpus by petitioner, Chi Feng Su, and the Court having read the pleadings and memorandum filed by the parties and the Court being fully advised, IT IS ORDERED THAT:

1. The Petition for a Writ of Habeas Corpus is granted;

2. The Sheriff of Kane County shall be permanently enjoined from holding or restricting the freedom of Chi Feng Su, based upon the charges in the case of *People of the State of Illinois v. Chi Feng Su*, Case No. 86 CF 981 in Kane County, Illinois;

3. The State's Attorney of Kane County and the Attorney General of the State of Illinois shall be permanently enjoined from prosecuting Chi Feng Su on any of the

charges brought against him as part of the case of *People of the State of Illinois v. Chi Feng Su*, Case No. 86 CF 981 in Kane County, Illinois.

IT IS SO ORDERED.

/s/ James H. Alesia
United States District Judge

Dated: MAY 10, 1991

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
CHI FENG SU,

Petitioner,

v.

ROBERT F. CASEY, et al.,

Respondents.

No. 89 C 4516
The Honorable James H. Alesia, Judge Presiding.

NOTICE OF APPEAL

Notice is hereby given that respondents, by their attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from an order granting the petitioner's petition for a writ of habeas corpus entered in this action on the 11th day of May, 1990.

Respectfully submitted,
NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: /s/ Arleen C. Anderson
ARLEEN C. ANDERSON
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3692

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 14, 1990.

By the Court:

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89-C-4516—Hon. James H. Alesia, *Judge*.

ORDER

A preliminary review of the short record indicates that the Notice of Appeal may be deficient. In *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2407 (1988), the Supreme Court held that naming the parties taking an appeal in the notice of appeal is a jurisdictional prerequisite to their participation in the appeal. This court has since held that the appellants taking the appeal must be specified in the body of the notice of appeal. *Bigby v. City of Chicago*, 871 F.2d 54 (7th Cir. 1989). Accordingly,

IT IS ORDERED that respondents-appellants shall file, on or before July 3, 1990, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

NOTE: Caption document "*JURISDICTIONAL MEMORANDUM.*" The filing of a Circuit Rule 3(c) Jurisdictional Statement does not satisfy your obligation under this order.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 18, 1990.

By the Court:

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89-C-4516—Hon. James H. Alesia, *Judge*.

ORDER

On consideration of the "JURISDICTIONAL MEMORANDUM" filed by counsel for appellants and the "RESPONSE TO RESPONDENTS-APPELLANTS JURISDICTIONAL MEMORANDUM" filed by counsel for appellee,

IT IS ORDERED that the briefing in this appeal shall proceed as follows:

1. The appellants shall file their joint brief and required short appendix on or before January 23, 1991.

2. The appellee shall file his brief on or before February 22, 1991.

3. The appellants shall file their joint reply brief, if any, on or before March 8, 1991.

The parties shall address the issue of appellate jurisdiction in their respective briefs. The clerk of this court is directed to distribute, along with the briefs in this appeal, copies of this order, the orders of June 14, 1990 and July 30, 1990 (corrected on July 31, 1990), and the jurisdictional memoranda of the parties.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

BOBBY BATTLE, et al., Plaintiffs-Appellees, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. PARK ANDERSON, his successor; RICHARD CRISP, Warden, Oklahoma State Penitentiary, and his successor; J. M. SUNDERLAND, Warden, Oklahoma State Reformatory, and his successor; DEPARTMENT OF CORRECTIONS; F. WARREN BENTON, Director, his successor, and the current; BOARD OF CORRECTIONS, STATE OF OKLAHOMA; FRANK E. CAREY, JR., President; LEROY KIRK; PATRICIA MONTGOMERY; GARY M. COOK; CHESTER T. CURTIN; SETH MILLINGTON; WILLIAM R. THOMPSON, as members and their successors, Defendants-Appellants

No. 89-7097

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

1991 U.S. App. LEXIS 26084

October 22, 1991, Filed

NOTICE:
THIS ORDER AND JUDGEMENT HAS NO PRECEDENTIAL VALUE AND SHALL NOT BE CITED, OR USED BY ANY COURT WITHIN THE TENTH CIRCUIT, EXCEPT FOR PURPOSES OF ESTABLISHING THE DOCTRINES OF THE LAW OF THE CASE, RES JUDICATA, OR COLLATERAL ESTOPPEL. 10TH CIR. R. 36.3.

PRIOR HISTORY:
Appeal from the United States District Court for the District Court for the Eastern District of Oklahoma; District No. 72-95-CIV.

DISPOSITION: DISMISSED

JUDGES: Logan, Moore, and Anderson, Circuit Judges.

OPINION BY: ANDERSON

OPINION: ORDER AND JUDGMENT

Park J. Anderson and his successor, Warden of the Oklahoma State Penitentiary at McAlester, Oklahoma, appeal from the denial of a motion to modify an injunction entered by the district court on September 11, 1978. Since the notice of appeal fails to satisfy the dictates of Fed. R. App. P. 3(c), and because Anderson and his successor have no standing to bring this appeal, the appeal is dismissed.

In 1978, the district court entered an order leading to the permanent closure of the East Cell House at the Oklahoma State Reformatory at Granite, Oklahoma. *Battle v. Anderson*, 457 F. Supp. 719, 739 (E.D. Okla. 1978). On May 1, 1989, the Attorney General of Oklahoma filed a Fed. R. Civ. P. 60(b)(5) motion to modify the portion of the district court order concerning habitation at Granite. The district court denied the motion. The Attorney General of Oklahoma filed a notice of appeal on November 21, 1989. On September 19, 1990, this court, sua sponte, raised the issue of whether the notice of appeal complied with the jurisdictional requirements of Fed. R. App. P. 3(c)[1] as interpreted by the Supreme Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The parties were ordered to brief the *Torres* issue, and they have responded.

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[1] Rule 3(c) reads in relevant part, "The notice of appeal shall specify the party or parties taking the appeal . . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c).

The issue arises because appellants identified themselves as "Park J. Anderson, et al." in the caption of the notice of appeal and coupled this with the phrase "defendants herein" in the body of the notice.[2] Park J. Anderson and his successor are wardens of the Oklahoma State Penitentiary at McAlester, Oklahoma. Neither the warden of the facility at Granite nor a higher official with authority over the Granite facility was specifically named as an appellant, although such individuals are named as defendants in the suit.

In *Torres*, the Supreme Court held that a failure to comply with the specificity requirement of Rule 3(c) presented a jurisdictional bar to appeal. 487 U.S. at 314. This court has consistently held that use of the phrase "et al." to designate more parties than the appellant named in the caption of the notice of appeal does not satisfy the command of Rule 3(c). See *Storage Technology v. U.S. Dist. Court for Dist. of Colo.*, 934 F.2d 244, 247-48 (10th Cir. 1991) (use of "et al." together with "all the Defendants of record herein" in body of appeal leaves reviewing court to determine identity of appellants without any clear point

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[2] The notice at issue here, filed November 21, 1989, reads:

BOBBY BATTLE, ET AL., Plaintiffs, and, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. PARK J. ANDERSON, ET AL., Defendants.

NOTICE OF APPEAL

Robert H. Henry, Attorney General of Oklahoma, appearing on behalf of the Defendants herein, respectfully appeals . . . from [the Distict] Court's Order of September 26, 1989 denying these Defendants' motion to modify previous injunctions to permit renovation of the East Cellhouse at the Oklahoma State Reformatory.

Respectfully submitted,

ROBERT H. HENRY, ATTORNEY GENERAL OF OKLAHOMA

of reference); *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 654 (10th Cir. 1990) ("et al." designation in conjunction with phrase "defendants above named hereby appeal" does not satisfy Rule 3(c)); *Laidley v. McClain*, 914 F.2d 1386, 1389 (10th Cir. 1990) (use of "et al." together with "plaintiffs hereby appeal" is insufficient to confer jurisdiction over unnamed plaintiffs under Rule 3(c)).[3] These cases are dispositive of the authority Anderson and his successor cite to us on appeal. As the First Circuit stated in *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174, 177 (1st Cir. 1988), "[i]t does not suffice that the actual appellants are now known and that no harm may have been done by reason of the insufficient notice of appeal."

Official capacity suits are an exception to the general rule of *Torres*. *Brown v. Palmer*, 915 F.2d 1435, 1439-40 (10th Cir. 1990). See also *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 657 n.6 (10th Cir. 1990). In *Brown*, plaintiffs brought suit against Colonel James Palmer, the Base Commander of Peterson Air Force Base, and Colonel Eugene Cullinane, the commanding officer of the headquarters of the Air Force's 3rd Space Support Wing, in their official capacities. The notice of appeal listed only Colonel Palmer as

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[3] Interpreting the language in *Torres* that a court may find that an appellant has complied with Rule 3(c) "if the litigant's action is the functional equivalent of what the rule requires," 487 U.S. at 317, this circuit has held that an appellant can timely cure any defects in the notice by filing additional documents with the court. See *Hubbert v. City of Moore, Okla.*, 923 F.2d 769 (10th Cir. 1991) (cure through timely filing of docketing statement). No such cure was effectuated here. The docketing statement was filed more than 60 days after the entry of the September 26, 1989 order appealed from here and cannot be considered timely under Fed. R. App. P. 4(a)(1).

the appellant in the caption of the appeal and used an "et al." designation to include Colonel Cullinane. We held that the United States had satisifed the jurisdictional requirement of Rule 3(c) because use of the "et al." designation in the case deprived neither plaintiffs nor the court of "fair notice of the specific individual or entity seeking to appeal." 915 F.2d at 1439 (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)). We noted that this was because "[p]laintiffs clearly understood that an appeal by Colonel Palmer was in effect an appeal by the United States in light of the fact that they had sued Colonel Palmer and Colonel Cullinane only in their official capacities." *Brown*, 915 F.2d at 1439.

In *Brown*, however, Colonel Palmer had standing to bring the appeal. Any decision reached in the case would bind all the members of the base because of Colonel Palmer's position as base commander. Here, by contrast, any judgment relating to Park Anderson and his successor will not bind the authorities responsible for the institution located in Granite, Oklahoma, which is the subject matter of this appeal. Anderson and his successor can only be bound as to events concerning the McAlester, Oklahoma facility. The *Brown* official capacity exception to *Torres* cannot sweep into the court's jurisdiction additional appellants who could not otherwise be bound by an appeal brought in their official capacity.

When the party named in the notice of appeal is not the real party in interest to the appeal, the court lacks jurisdiction to reach the merits of the appeal. See *Concorde Resources, Inc. v. Woosley (In re Woosley)*, 855 F.2d 687 (10th Cir. 1988). Appellant Anderson and his successor lack the "personal stake in the outcome of the controversy" that is a prerequisite for standing. *Sierra Club v.*

Morton, 405 U.S. 727, 732 (1972) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Anderson and his successor do not advance any further exceptions to *Torres* and we decline to adopt any.[4]

For the foregoing reasons, the appeal is DISMISSED.

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[4] We note that plaintiffs in this suit have been certified as a class. The Fifth Circuit has adopted a class action exception to *Torres*. *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989); *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 84 (5th Cir. 1990). Once certified as a class, the class party only needs to name the class representative in the notice of appeal. An "et al." designation also perfects the appeal of all the remaining members of the class since the class representative binds all members of the class. By contrast, the parties opposing the class cannot merely invoke the generic class label in their notice of appeal because not every member of that group who could possibly appeal may decide to become a party to the appeal.